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December 14, 2012

Electronic Mail to NathanNYSDCChambers@nysd.uscourts.gov

Honorable Alison J. Nathan
United States District Judge
United States Courthouse
500 Pearl Street
New York, NY 10007

Re: TufAmerica, Inc. v. Diamond, et al., 12cv3529 (AJN) - Election to Amend Complaint

Dear Judge Nathan,

I am counsel for plaintiff TufAmerica, Inc., and write in connection with the defendants' request for an extension of time to move or respond to the amended complaint in this case. The purpose of this letter is to address some questions and inaccuracies raised by defendants' letter of today's date.

The Filing of the Amended Complaint. Defendants incorrectly state that the amended complaint has not been filed. The amended complaint was mailed to the clerk's office for filing the same day it was served on defendants. It does not yet appear on the ECF docket because amended complaints, like original complaints, are not filed by counsel via ECF. Instead, once the physical document has been received by the clerk, counsel must email a copy of the document to the clerk for review and filing. I am awaiting the filing receipt from the clerk (which I will include with my email to the clerk) before I email the amended complaint to the clerk for review and ECF filing.

The New Claims. While the amended complaint does add claims for additional infringements, those claims are structured in a manner that is entirely consistent with the structure of the original infringement claims. The added claims are thus not so different from the original claims as to impose significant additional burdens on defendants if their intention is to file another Fed.R.Civ.P. 12(b)(6) motion.

Defendants' Resources. That said, defendants have had the amended complaint in hand since December 6, but waited a full week before requesting additional time to respond. Defendants have ample time to prepare their motion to dismiss. As I pointed out to counsel, defendants are indeed represented by a large law firm, and based on the appearance at the initial pretrial conference in this case of two partners from that firm, both defendants and Sheppard Mullin have ample resources to devote to the defense of this case.

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Delivery of Recordings. Contrary to their claim in today's letter, defendants did not request the sound recordings of the sampled music until December 12. I provided three of the four recordings ("some, but not all," in defendants' parlance) on December 13, and requested confirmation that they had been received while I dealt with some technical problems I was having with the fourth recording. I never received the requested confirmation, but have since contacted counsel, confirmed that counsel received the first three recordings, and have provided the fourth.

Request for Additional Time. Defendants simultaneously complain that TufAmerica's suit was filed years after the sampling albums were released while they seek to delay this proceeding because of the year-end holidays. TufAmerica would prefer to move past any claimed issues with the amended complaint as quickly as possible, and thus opposes defendants' request for an extension of time.

Please contact me with any questions.

Respectfully yours,

/Kelly D. Talcott/

Kelly D. Talcott

c: all counsel via electronic mail